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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

REMETRIX LLC, Plaintiff and Appellant, v. SCOTT A. RUCH et al., Defendants and Appellants.	A130311 (Alameda County Super. Ct. No. RG-10511868)

Defendants Scott A. Ruch and Ruch Logic LLC appeal the trial court's order denying their anti-SLAPP motion.[1] Plaintiff ReMetrix LLC cross-appeals from the court's order denying its request for attorney fees. We affirm both orders.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Complaint

A. The Causes of Action

On April 27, 2010, plaintiff filed a complaint against defendants. The complaint states nine causes of action for: (1) misappropriation of trade secrets in violation of Civil Code section 3426 et seq., (2) breach of loyalty and fiduciary duty, (3) unfair competition, (4) intentional interference with prospective economic advantage, (5) a second claim for breach of loyalty and fiduciary duty, (6) unfair and unlawful competition in violation of Business and Professions Code section 17200 et seq., (7)

[1] "SLAPP is an acronym for 'strategic lawsuit against public participation.' [Citation.]" (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 16, fn. 1 (*Simpson*).)

intentional interference with prospective economic advantage, (8) conversion, and (9) accounting.

B. Background

The complaint alleges that Ruch was employed by plaintiff from November 2001 until his resignation on March 23, 2009. Plaintiff's business involves developing and preparing submerged habitat maps for waterways owned by or under the jurisdiction of its clients to assist them in developing and improving the herbicidal control of aquatic vegetation. According to the complaint, plaintiff is "the leading national firm focused on submerged vegetation mapping, bathymetry [water depth mapping] and species quantification." Over the span of several years, plaintiff created a correction and adjustment process referred to in the complaint as the "ReMetrix Processing Tool," which corrects for anomalies in data thereby rendering the measurements of plant height, density, and cover substantially more accurate. Plaintiff incorporated the ReMetrix Processing Tool, including all of its unique and highly individualized algorithms, into a computer software program called TideStar. The complaint refers to these two products as the "Trade Secret."

Plaintiff claims the Trade Secret has substantial value in that it allows plaintiff to provide its customers with accurate maps that help them plan, calibrate and track the herbicidal treatment of vegetation in a precise, refined, and efficient manner. Plaintiff has undertaken significant efforts to protect and preserve the secrecy and confidentiality of the Trade Secret by limiting access to certain personnel, maintaining a confidential pass code to restrict computer access, requiring personnel to execute confidentiality agreements, and reminding all personnel of the need to strictly maintain confidentiality at all times.

The complaint alleges that plaintiff had a seven-year business relationship with the California Department of Boating and Waterway (DBW), consisting of plaintiff's hydroacoustic mapping of the Sacramento-San Joaquin Delta (Delta). During this time, Ruch was employed by plaintiff, first as a technical specialist and later as a project manager. Ruch's duties included (1) collecting hydroacoustic data, (2) processing,

correcting and refining such data, and (3) using software to prepare accurate maps of such waterways. Ruch was a trusted employee of plaintiff, and was therefore given access to the Trade Secret in the performance of his job. He was at all times fully aware of the highly sensitive and confidential nature of the Trade Secret as plaintiff's proprietary information, and agreed to maintain its confidentiality.

C. Ruch Secures the DBW Contract

The complaint alleges that Ruch subsequently formed his own company called Ruch Logic and resigned from plaintiff immediately thereafter, taking the Trade Secret without plaintiff's knowledge or consent. He announced to the DBW that he had formed his own company and actively solicited the DBW's business by representing his intent to use the Trade Secret should he be awarded the mapping contract. On this basis, his company was awarded a three-year contract with the DBW. He allegedly continues to use the Trade Secret in the performance of this contract.

The complaint further states that up through March 2009, the DBW had expressed a clear intention to award plaintiff a new three-year contract following the expiration of the parties' existing contract. After this announcement, Ruch telephoned a DBW officer and scheduled a clandestine follow-up meeting lasting almost two hours. Ruch told the officer of his intent to resign from plaintiff and form his own company, conveying false and/or misleading information designed to create the false impression that plaintiff had a conflict of interest such that it should not be awarded a renewed contract. Ruch actively solicited the contract for his own company, resigned from plaintiff after he received assurances from the DBW that it would award him the new contract, and sabotaged his company-issued computer by destroying confidential and proprietary data.

The complaint alleges plaintiff has suffered irreparable and continuing injury from defendants' use of the Trade Secret. Plaintiff prays for injunctive relief, as well as compensatory and punitive damages.

II. Preliminary Injunction and Anti-SLAPP Motion

On June 22, 2010, plaintiff filed a motion for a preliminary injunction. Supporting the motion are declarations of key company technicians and developers, as well as forensic experts.

On July 21, 2010, defendants filed a motion to strike the complaint under the anti-SLAPP statute, Code of Civil Procedure section 425.16.[2] In an accompanying declaration filed by Ruch, he reports that Ruch Logic LLC is wholly owned by him and has contracted with the DBW "to monitor aquatic herbicide treatment efficacy on the exotic invasive submersed plant *Egeria densa* and mapping/monitoring associated native/non-native submersed vegetation communities" in the Delta. He denies plaintiff ever required him to sign a nondisclosure or a noncompete agreement.

Ruch states that an herbicide manufacturer named SePRO became plaintiff's sole owner in early 2005, after which Ruch became "concerned about a conflict of interest with regard to the DBW contract because I was monitoring the effectiveness of herbicides sold by SePRO to the State of California." That year, at Ruch's urging, plaintiff's Commercial Manager Doug Henderson came to California where they both met with the DBW and informed the agency about SePRO's ownership interest in plaintiff.

Ruch's declaration also reports that he met with a DBW representative on March 11, 2009 and told her he was "not comfortable working for SePRO/ReMetrix on the herbicide monitoring program because of the conflict of interest created by SePRO's total ownership and control of ReMetrix and SePRO's associated attempts at controlling interest in my data results and presentation." He offered to work as a consultant to the DBW while he went to graduate school. Five days later, the DBW announced it would not award another contract to plaintiff due to SePRO's sole ownership. Two days later, Ruch formed Ruch Logic. He resigned from plaintiff the following day. On March 27,

[2] All further statutory references are to the Code of Civil Procedure except as otherwise indicated.

2009, he submitted a proposal to the DBW for herbicide monitoring in the Delta. His company was awarded the contract on April 24, 2009.

On July 23, 2010, defendants filed their opposition to plaintiff's request for a preliminary injunction. Included in the opposition papers is a declaration of Marcia Carlock, the manager of the Aquatic Weed Program at the DBW. In her declaration, she states that certain environmental agencies had expressed concern about the fact that plaintiff is wholly owned by SePRO. SePRO manufactures the chemical Fluridone, which is the herbicide used in the *Egeria densa* treatment program. The DBW "had no choice but to contract with ReMetrix until March 1, 2009, as there were previously no other companies who could perform the monitoring required by the contract." With the formation of Ruch Logic, the DBW was able for the first time to put the contract out for competitive bidding. Ruch's company was awarded the contract because he had more experience with the Delta than the employees of the other bidders (including plaintiff, his former employer), and because his company had no conflict of interest because it was not connected to SePRO.

In its opposition to the anti-SLAPP motion, plaintiff included a declaration prepared by Henderson. Henderson states that plaintiff became fully owned by SePRO in early February 2005. On February 28, 2005, Ruch and Henderson met with Carlock and members of her staff. Ruch and Henderson informed the agency of the ownership change. This is the same 2005 meeting Ruch mentions in his own declaration. According to Henderson, the DBW officers did not seem concerned and subsequently awarded two contracts to plaintiff while expressing satisfaction with the company's performance. Meanwhile, Ruch became dissatisfied with the compensation he was receiving from plaintiff.

Henderson also states that on March 10, 2009, Carlock sent an email indicating that no other organizations had expressed interest in response to a DBW Request For Information (RFI) regarding a new mapping contract, and that the DBW was ready to proceed with a noncompetitive bid proposal in favor of plaintiff. Carlock indicated the DBW had "the justification all set" but needed the actual scope of work and a budget

page for the contract. Because Ruch was the project manager on the DBW project for plaintiff, he was aware that an RFI would be sent out to determine whether there were any other qualified interested companies.

III. The Trial Court Rules

On September 29, 2010, the trial court filed its order denying defendants' special motion to strike. The court found defendants had failed to meet their initial burden to establish that the challenged causes of action arise from acts taken in furtherance of the rights of petition or free speech. Citing *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 932 (*Kajima*), the court noted there was no evidence that the acts complained of were part of any official proceeding or made in connection with an issue under consideration by a government agency other than the renewal of the DBW contract. The court further found that even if Ruch's comments about the plaintiff's alleged conflict of interest fell within the provision for speech made in connection with an issue of public interest, it did not appear that any of plaintiff's claims arose from that conduct.

The trial court first noted the DBW had been aware of the alleged conflict of interest for *four years* before Ruch brought it up in early 2009. Second, over those four years the DBW had continued to contract with plaintiff in spite of this awareness. Third, it was not the communication of the alleged conflict of interest, but the solicitation of the contract, formation of a competing company, and the alleged misappropriation of trade secrets that gave rise to plaintiff's claims. And finally, the cited communication is only incidental to these claims. In its order, the court also denied plaintiff's request for attorney fees, finding defendants' motion was not brought in bad faith, was not frivolous, and was not made solely with the intent to cause unnecessary delay.

On this same day, the trial court granted, in part, plaintiff's motion for a preliminary injunction. The injunction prohibits defendants from using, disclosing, disseminating, revealing, transmitting, or publishing the Trade Secret.

DISCUSSION

I. Standard of Review

Section 425.16, known as the anti-SLAPP statute, provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) "The phrase 'arising from' . . . has been interpreted to mean that 'the act underlying the plaintiff's cause' or 'the act which forms the basis for the plaintiff's cause of action' must have been an act in furtherance of the right of petition or free speech." (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1001 (*ComputerXpress*).) "The goal [of section 425.16] is to eliminate meritless or retaliatory litigation at an early stage of the proceedings." (*Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 806 (*Seelig*).)

Courts engage in a two-step process in determining whether a cause of action is subject to a special motion to strike under section 425.16. First, the court determines if the challenged cause of action arises from protected activity. If the defendant makes such a showing, the burden shifts to the plaintiff to establish, with admissible evidence, a reasonable probability of prevailing on the merits. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Id.* at p. 89.)

A ruling on a section 425.16 motion is reviewed de novo. (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 645 (*Thomas*).) We review the record independently to determine whether the asserted cause of action arises from activity protected under the statute and, if so, whether the plaintiff has shown a probability of prevailing on the merits. (*ComputerXpress, supra,* 93 Cal.App.4th 993, 999; *Seelig, supra,* 97 Cal.App.4th 798, 807.)

Before we consider whether the conduct or speech at issue is protected by section 425.16, we will address plaintiff's contention that this case is excepted from the reach of the anti-SLAPP statute under the commercial speech exemption provided in section 425.17, subdivision (c). The trial court did not address this issue in its order.

II. Section 425.17

Per section 425.17, the anti-SLAPP statute does not apply to causes of action arising from specified claims against business entities that involve commercial speech or conduct. Section 425.17 was adopted in 2003 to address "a disturbing abuse of Section 425.16 . . . ." (§ 425.17, subd. (a).) Section 425.17 exempts certain lawsuits from the ambit of the anti-SLAPP statute. As such, "it raises a threshold issue, and we address it prior to examining the applicability of section 425.16." (*Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 840.)

The commercial speech exemption set forth in section 425.17, subdivision (c) provides, in relevant part: "Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, . . . arising from any statement or conduct by that person if both of the following conditions exist: [¶] (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services . . . . [¶] (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer . . . ." The commercial speech exemption is a statutory exception to section 425.16 and should be narrowly construed. (*Simpson, supra,* 49 Cal.4th 12, 22.) Plaintiff, as the party seeking the benefit of the commercial speech exemption, bears the burden of proof as to its applicability. (*Id.* at p. 26.)

Our Supreme Court has set forth a four-part test in determining whether section 425.17, subdivision (c) operates to exempt from the anti-SLAPP law a cause of action arising from commercial speech. An action is exempt when: "(1) the cause of action is

against a person primarily engaged in the business of selling or leasing goods or services; (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services; (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and (4) the intended audience for the statement or conduct meets the definition set forth in section 425.17(c)(2)." (*Simpson, supra,* 49 Cal.4th 12, 30.) We examine each prong of this test in turn.

A. Defendants Are Primarily Engaged in the Business of Selling Services

Defendants assert this first prong is not satisfied because Ruch was not engaged in the sale of services at the time he made the statements to the DBW regarding ReMetrix's conflict of interest. They focus solely on Ruch's alleged comment to DBW in March 2009 regarding SePRO's ownership of ReMetrix, which they claim was made before he attempted to solicit the contract. We note the test is not phrased as pertaining solely to whether the defendant was in business at the time the relevant communication was made. Instead, the test is whether the cause of action in the complaint has been brought against a person primarily engaged in the business of selling or leasing services or goods. Here, there is no dispute that defendants are engaged in the business of providing underwater vegetation mapping services.

Regardless, as detailed above plaintiff presented evidence showing that the DBW had all but promised it the mapping contract on March 10, 2009. Ruch met with the DBW the very next day to raise the issue of plaintiff's supposed conflict of interest, allegedly using this issue as leverage to position himself as a superior vendor. His strategy was successful five days later on March 16, 2009, when the DBW informed plaintiff that the DBW intended to open the contract to a competitive bidding process. Ruch immediately took steps to form his own company and secured the contract. Thus, even assuming this prong of the test requires a person to be engaged in a business at the time the relevant communication is made, this requirement is satisfied here as the timing

of the events supports the conclusion that the acts complained of were undertaken in furtherance of Ruch's business interests. Accordingly, this prong of the test is satisfied.

B. The Causes of Action Arise from Statements Consisting of Representations of Fact about Plaintiff's Business Operations

In considering the second prong of the commercial speech exemption, the Supreme Court in *Simpson* held the exemption did not apply to an attorney's advertisement containing allegedly defamatory statements about a galvanized screw manufacturer's products. (*Simpson, supra*, 49 Cal.4th 12, 30.) The court noted any implication in the advertisement that the screws were defective " 'is not "about" [the attorney's] or a competitor's "business operations, goods, or services . . . ." (§ 425.17(c)(1).) It is, rather, a statement "about" [the manufacturer]—or, more precisely, [the manufacturer's] products.' It therefore falls squarely outside section 425.17(c)'s exemption for commercial speech." (*Ibid.*) To the extent the advertisement included statements about the attorney's own services, including an offer to investigate potential claims, and (allegedly) an implication that the attorney had discovered the alleged defect, these statements did not trigger the commercial speech exemption, in part because the manufacturer's defamation claims did not arise from those statements; instead, the claims arose from the attorney's statements about the alleged defects in the manufacturer's products. (*Id.* at pp. 30–32.)

As we will discuss further below, the causes of action contained in the complaint do not arise primarily from Ruch's statements to the DBW about SePRO's ownership of plaintiff. However, for purposes of this prong we focus again on Ruch's statements about the alleged conflict of interest. It is clear that his statements consisted of representations of fact about plaintiff's business operations, namely that plaintiff is wholly owned by a company that manufactures herbicides, and that this relationship created a conflict of interest in the context of the work plaintiff performed for the DBW. This second prong is thus satisfied.

C. The Statement Was Made for the Purpose of Obtaining Approval for, Promoting, or Securing Sales of Defendants' Services

Defendants contend Ruch was acting only as "a concerned scientist and whistle-blower who merely offered his services to the DBW as a consultant while he attended school." They assert the conflict of interest issue was under review by the DBW, and claim that he acted "for more than the mere purpose of obtaining sales of services for himself." They cite to *Sunset Millennium Associates, LLC v. LHO Grafton Hotel, L.P.* (2006) 146 Cal.App.4th 300 (*Sunset*) for the proposition that this prong is not satisfied because Ruch's statements were made to a public agency to address a public issue. Their reliance is misplaced.

In *Sunset,* the underlying complaint alleged that a hotel defendant's administrative objection to the approval of an environmental impact report concerning the plaintiff's hotel development project breached the parties' agreements not to challenge any expansion of each other's hotels. (146 Cal.App.4th 300, 302–303.) The appellate court found the first part of section 426.17, subdivision (c) was satisfied in that the environmental objections were statements of fact about a competitor's business, but concluded the exemption was inapplicable because "the statements made during the administrative and litigation process were in an effort to forestall environmental approval of plaintiff's 2004 project; not for the purpose of promoting defendant's hotel 'goods and services' . . . ." (*Sunset, supra,* at p. 313.)

Here, plaintiff sufficiently demonstrated that Ruch's communications were not about science or whistle-blowing. There was no whistle to blow, as it is undisputed that the relationship between plaintiff and SePRO was disclosed to the DBW years before. Instead, Ruch's statements and conduct served to promote his own business interests. Again, the sequence of events is telling. On March 10, 2009, Carlock told Henderson that the DBW was prepared to move forward with ReMetrix on the new contract. On March 16, 2009, she informed Henderson that the DBW had changed its mind and desired to move forward with Ruch instead. Rather than constituting comments undertaken in the interests of science and the environment, we conclude Ruch's

comments were made for the sole purpose of promoting his company's services to the DBW.

D. The Intended Audience Was an Actual or Potential Customer

We also have no difficulty in concluding that Ruch's audience was a potential customer. It is undisputed that the DBW contracted with plaintiff for many years to provide the exact services that Ruch's company has provided to the DBW since replacing plaintiff in 2009. Defendants disingenuously assert the DBW was not a potential customer of Ruch's at the time of his statements "since Ruch was merely a concerned scientist and whistle-blower." To the contrary, the DBW clearly was a potential customer at the time of the alleged statements. The rapid sequence of subsequent events amply demonstrates the fallacy of defendants' assertions.

Defendants further argue that the commercial speech exemption applies only where the dispute is *purely* commercial in nature, citing to *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482. In *Taheri*, a lawsuit was brought by a law firm alleging that another attorney improperly solicited its client. The appellate court found the lawsuit was subject to the anti-SLAPP statute, "as it arose out of the attorney's communications concerning pending litigation, and was not barred by the commercial speech exception to the statute." (*Id.* at p. 485.) While the conduct could arguably have been viewed as falling within the scope of section 425.17, the appellate court concluded that "a cause of action arising from a lawyer's conduct, when the conduct includes advice to a prospective client on pending litigation, does not fall within the statutory exemption to the anti-SLAPP statute. Any other conclusion would be inconsistent with the intent of the Legislature when it passed section 425.17, and would conflict with the client's fundamental right of access to the courts, which necessarily includes the right to be represented by the attorney of his or her choice." (*Taheri, supra,* at p. 490.) The court found the conduct complained of was much more than "commercial speech" because it "was in essence advice by a lawyer on a pending legal matter." (*Id*. at p. 491.) The court also found that construing the exemption to apply to actions arising from advice given by

a lawyer on a pending legal matter would "serve to thwart the client's fundamental right . . . to the lawyer of his choice." (*Ibid*.)

The present case is distinguishable from *Taheri* in that it does not concern the attorney-client relationship or the right of access to the courts. While defendants repeatedly assert Ruch was acting as a "concerned scientist and citizen speaking out regarding an important public issue," his own declaration reveals that the DBW knew about the alleged conflict of interest for several years prior to his "whistle-blowing petition activity." The relatively brief span of time between his alleged whistle-blowing and his procurement of the contract with DBW suggests his altruistic motives were negligible at best. Instead, the evidence supports the conclusion that Ruch used the conflict of interest issue as leverage to secure the DBW contract for himself.[3]

III. The Complaint's Allegations Do Not Arise from Protected Activity

Even if the commercial speech exemption does not apply, we agree with the trial court that the allegations in the complaint do not implicate activity protected under section 416.25 because even if Ruch engaged in protected conduct, that conduct itself is merely incidental to plaintiff's claims.

A. Ruch's Conduct is Not Protected

Defendants contend that all of plaintiff's claims arise from protected petitioning activity. They first assert the complaint's allegations fall within section 425.16, subdivision (e)(1) and (2). Subdivision (e)(1) of section 425.16 provides, in relevant part, that the statute protects any "written or oral statement or writing made before . . . [an] executive . . . proceeding or any other official proceeding authorized by law . . . ."

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[3] Defendants further distort the complaint by asserting the pleading attacks Ruch "for being a whistle-blower, because he not only discussed the conflict issue with the DBW, he also refused to color his reports to the DBW to support SePRO's herbicide sales." As we have summarized above, the complaint plainly arises from defendants' interference with plaintiff's prospective contract with the DBW and the ensuing misappropriation of the Trade Secret. " '[W]hen the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.' [Citation.]" (*Thomas, supra*, 126 Cal.App.4th 635, 653.) We also note the complaint does not mention Ruch's alleged refusal to alter his reports.

Subdivision (e)(2) provides, in relevant part, that the statute protects any "written or oral statement or writing made in connection with an issue under consideration or review by . . . [an] executive . . . body, or any official proceeding authorized by law . . . ." Defendants assert the complaint's allegations are subject to these two subdivisions because "they are based on alleged statements to the government, and/or statements made in connection with matters under review by the government." We agree with the trial court that this issue is controlled by *Kajima.*

In *Kajima,* a construction company sued a city, claiming it was owed payment for work on a reconstruction project. (*Kajima, supra,* 95 Cal.App.4th 921, 924–925.) The city cross-complained, alleging causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing. The construction company moved under section 425.16 to strike the amended cross-complaint as a SLAPP. The trial court ultimately struck only one cause of action. (*Id.* at pp. 925–926.) The appellate court affirmed, concluding the improper conduct alleged in the city's cross-complaint (including the allegation that the construction company intentionally underbid the contract) did not arise from the company's free speech activities but rather from its bidding and contracting practices. (*Id*. at p. 929.) Even the company admitted that the majority of the alleged acts occurred when its initial bid was submitted, and thus did not arise out of the filing of its complaint. (*Id.* at p. 930.) Similarly, here the acts complained of arise from defendants' bidding and contracting practices, and not from statements made in connection with an official proceeding.

We also reject defendants' argument that the complaint arises from "other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).) "The fact that conduct, when considered in the abstract, may have particular public policy implications does not render it 'conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest' [citation]. The inquiry must focus on the content of the speech or other conduct on which the cause of action is

based, rather than generalities or abstractions. [Citations.] Consistent with the purpose of the anti-SLAPP statute 'to encourage continued participation in matters of public significance' [citation], we believe that under clause (4), the constitutionally protected free speech or petitioning activity must directly contribute in some manner to the discussion of an issue of public interest or seek to influence a discretionary decision by an official body relating to such an issue." (*City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 217–218.)

In our view, the true public issue is the proper management of the Delta's waterways and the control of invasive weeds, not the corporate ownership of the contractor who provides the DBW with aquatic mapping services.[4] We also note the factual basis for the alleged conflict of interest is undisputed by plaintiff, who did not attempt to conceal from the DBW the fact that it is wholly owned by SePRO. Nor has Ruch presented any evidence that the alleged conflict of interest violated any laws or operated to compromise the services plaintiff had provided to the DBW for many years. Essentially, the underlying dispute here involves two private business entities who happen to provide services that are likely to be rendered to public agencies. That a public entity is involved does not, in and of itself, transform this private dispute into a matter of public interest. Thus, it does not appear that Ruch's comments were made in connection with an issue of public interest.

[4] In *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561, the appellate court analyzed cases in which the public interest was merely incidental or of generalized nature and insufficient to trigger application of the anti-SLAPP law. Its analysis of *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 111, is instructive: "Finally, in [*Mann*], a corporation engaged in the business of maintaining water systems was sued for allegedly soliciting a competitor's customers by falsely claiming the competitor was using and dumping toxic illegal chemicals. In affirming denial of the defendant's anti-SLAPP motion, the court concluded that '[a]lthough pollution can affect large numbers of people and is a matter of general public interest,' the statements giving rise to the plaintiff's claims 'were not about pollution or potential public health and safety issues in general, but about [the plaintiff's] specific business practices.' [Citation.]" (*World Financial, supra,* at pp. 1571–1572.)

B. The Complaint Does Not Arise from Any Protected Activity

Even assuming that the circumstances surrounding SePRO's ownership of plaintiff is an issue of public interest, we agree with plaintiff that the allegations of the complaint do not arise from Ruch's communication of that conflict of interest to the DBW.

When a lawsuit involves both protected and unprotected activity, the court looks to the gravamen of the claims to determine if the case is a SLAPP. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672.) Protected conduct which is merely incidental to the claims does not fall within the ambit of section 425.16. (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188; *Peregrine, supra,* at p. 672.) Where the defendant's protected activity will only be used as evidence in the plaintiff's case, and none of the claims are based on it, the protected activity is only incidental to the claims. (*Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 809–810.) Determining the gravamen of the claims requires examination of the specific acts of alleged wrongdoing and not just the form of the plaintiff's causes of action. (*Peregrine, supra,* at pp. 671–673.) In deciding whether the "arising from" requirement is met, a court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b).)

Significantly, Ruch's statements regarding the alleged conflict of interest are mentioned only a few times in the complaint. The first reference merely sets the context for the first breach of fiduciary duty claim.[5] The allegation is incorporated by reference into several of the remaining claims, but does not, in and of itself, form the basis for any of the succeeding causes of action. Accordingly, the alleged conduct and statements are merely incidental to plaintiff's claims.

[5] The allegations as to this cause of action state that in early 2009 Ruch "knowingly and intentionally conveyed to DBW false and/or misleading information designed to create the totally false impression to DBW that ReMetrix had a conflict of interest such that [ReMetrix] should not be awarded the new three-year contract."

Because defendants have not met their burden to show that the complaint is subject to the anti-SLAPP statute, we need not consider whether plaintiff can demonstrate it is likely to succeed on the merits.

IV. Attorney Fees

Plaintiff has filed a cross-appeal from the trial court's denial of its request for attorney fees. "If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." (§ 425.16, subd. (c)(1).) The party seeking fees bears the burden of establishing entitlement to those fees. (*ComputerXpress, supra,* 93 Cal.App.4th 993, 1020.) "A determination of frivolousness requires a finding the motion is 'totally and completely without merit' [citation], that is, 'any reasonable attorney would agree such motion is totally devoid of merit.' [Citation.]" (*Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382, 1392, superseded by statute on another point as noted in *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1348–1349.) If the court determines that the motion was frivolous, an award of costs and fees is mandatory. (*Moore v. Shaw* (2004) 116 Cal.App.4th 182, 199 (*Moore*).) We review the trial court's ruling for abuse of discretion. (*Decker, supra,* at p. 1391.)

A. Appealability

Preliminarily, we note defendants contend the contested order is not cognizable on appeal. This argument is meritless.[6] Plaintiff filed its notice of cross-appeal on November 22, 2010, 10 days after defendants filed their appeal. "In cases where, as here, the issue of whether the anti-SLAPP motion should have been granted is properly before the appellate court, it would be absurd to defer the issue of attorney fees until a future date, resulting in the probable waste of judicial resources. When the first issue is

[6] The case defendants rely on, *Doe v. Luster* (2006) 145 Cal.App.4th 139, is distinguishable. In that case, the plaintiff brought a separate motion for attorney fees after it successfully opposed an anti-SLAPP motion. (*Id.* at p. 142.) After the trial court denied the motion for attorney fees, the plaintiff appealed the order denying the motion. The appellate court found the order was not immediately appealable because the appeal was made separate and apart from any appeal of the order denying the anti-SLAPP motion at issue in that case. (*Ibid.*)

properly raised, appellate jurisdiction over both issues under section 425.16, subdivision (i) is proper." (*Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265, 275 (*Baharian-Mehr*).)

B. The Trial Court Did Not Abuse Its Discretion in Failing to Award Sanctions.

Plaintiff contends defendants' anti-SLAPP motion was frivolous, made in bad faith, and intended solely to cause delay. As such, it claims the trial court abused its discretion in failing to award attorney fees. Plaintiff asserts defendants knew at least a month before they filed their anti-SLAPP motion that it would likely succeed on the merits of its complaint. Plaintiff also states that it supplied defendants with "exhaustive and comprehensive evidence" indicating that the anti-SLAPP law did not apply to any claim in the complaint. It also contends the trial court failed to exercise its discretion in determining whether attorney fees were warranted because its ruling merely states: "The Court does not find that this motion was brought in bad faith, frivolous, or solely intended to cause unnecessary delay."

Our review of relevant case law leads us to conclude the trial court here did not abuse its discretion. In *Moore*, an attorney retained to perform estate planning services drafted an agreement to terminate a trust. As a result, trust assets were distributed to several persons. After regaining some of the trust property, the trustee filed an action against the attorney based on breach of trust. The attorney's anti-SLAPP motion was denied. When attorney fees were not awarded to the trustee, both parties sought review. On appeal, the court determined that section 425.16 did not apply because there was no showing that the document was drafted in connection with pending or imminent litigation. Instead, the conduct was simply part of a private transaction that was unconnected to any "public issue" or "issue of public interest." Because the motion was frivolous, the trial court erred when it failed to award attorney fees to the trustee: "Because [the attorney's] underlying conduct clearly did not constitute an act in furtherance of the right to petition or free speech in connection with a public issue, as those terms are defined in section 425.16, any reasonable attorney would agree that an anti-SLAPP motion did not lie under these circumstances and that the instant motion was

totally devoid of merit. Accordingly, an award to [the trustee] of reasonable attorney fees was mandatory [citation], and the trial court lacked discretion to deny [the trustee's] request therefor." (*Moore, supra,* 116 Cal.App.4th 182, 200.)

In *Baharian-Mehr*, the appellate court held that the defendant's anti-SLAPP motion was properly denied because the complaint did not arise from any protected activity, but instead arose from a private business dispute between the parties. After finding accounting irregularities, a business partner had sued another partner for mismanagement and misuse of funds. One of the alleged improper expenditures involved hiring attorneys and a private investigator in connection with wage and hour litigation. The court noted the gravamen of plaintiff's complaint was not that the defendant's petitioning activities caused harm, but that his wasteful and unnecessary spending on attorneys and an investigator did. (*Baharian-Mehr, supra,* 189 Cal.App.4th 265, 273.) The court agreed that a reasonable attorney should have been aware that a business dispute involving incidental protected activity was not subject to the anti-SLAPP statute. The court found no abuse of discretion in the award of attorney fees to the plaintiff, agreeing with the trial court that the defendant's motion was frivolous. (*Id.* at p. 275.)

While we agree defendants' motion is lacking in merit, we do not find the trial court's ruling denying plaintiff attorney fees amounts to an abuse of discretion. In particular, the present case is distinguishable from *Moore* in that, while the contracting parties are private, the matter does involve statements made to an officer of a public entity. The matter also bears a tangential relationship to an issue of public interest, namely, the proper management of invasive vegetation in the Delta. The fact that the motion ultimately failed does not mean that it is frivolous as a matter of law, or that it was brought in bad faith or with the intent to cause delay. Moreover, unlike the appellate court in *Baharian-Mehr,* here we are being asked to reverse a lower court's decision and find an abuse of discretion. This we decline to do. We also see no reason to infer that the trial court did not fully consider this issue.[7] While we are sympathetic to plaintiff's

[7] We have read the reporter's transcript of the September 16, 2010 hearing on the anti-SLAPP motion. During the hearing, plaintiff did not raise the attorney fee issue.

arguments, we conclude the court did not abuse its discretion in refusing to award plaintiff its attorney fees.[8]

DISPOSITION

The orders are affirmed.

_____

Dondero, J.

We concur:

_____

Marchiano, P. J.

_____

Banke, J.

[8] As many appellate courts have noted, the increasing frequency with which anti-SLAPP motions are brought impose an added burden on opposing parties as well as the courts. "While a special motion to strike is an appropriate screening mechanism to eliminate meritless litigation at an early stage, such motions should only be brought when they fit within the parameters of section 425.16." (*Moore, supra*, 116 Cal.App.4th 182, 200, fn. 11.)